

AMENDED IN ASSEMBLY JULY 16, 2009

AMENDED IN ASSEMBLY JULY 2, 2009

AMENDED IN SENATE APRIL 13, 2009

SENATE BILL

No. 220

**Introduced by Senator Yee
(Coauthor: Senator DeSaulnier)**

February 23, 2009

An act to amend Sections 8547.2, 8547.8, 19683, and 19683.5 of the Government Code, relating to whistleblower protections.

LEGISLATIVE COUNSEL'S DIGEST

SB 220, as amended, Yee. Whistleblower protection.

(1) The California Whistleblower Protection Act authorizes a state employee or an applicant for state employment to file a complaint, as specified, with the State Personnel Board alleging reprisal, retaliation, threats, coercion, or similar improper conduct prohibited under the act.

This bill would in addition provide that the act applies to former employees, as specified, and ~~prohibits to an individual appointed by the Legislature to a state board or commission and who is not a Member or employee of the Legislature.~~ The bill would also prohibit retaliation in the form of decreasing the job responsibilities of an employee's normal workload.

(2) Existing law provides that in addition to all other penalties provided by law, any person who intentionally engages in acts of reprisal, retaliation, threats, coercion, or similar acts against a state employee or applicant for state employment for having made a protected disclosure is liable in an action for damages brought against him or her by the injured party. However, any action for damages is not available

to the injured party unless the injured party has first filed a complaint with the State Personnel Board, as specified, and the board has issued, or failed to issue, findings, as specified. For purposes of these provisions, protected disclosure means any good faith communication that discloses or demonstrates an intention to disclose information that may evidence an improper governmental activity or any condition that may significantly threaten the health or safety of employees or the public if the disclosure or intention to disclose was for the purpose of remedying that condition.

This bill would also require that when the injured party has requested a right-to-sue notice from the board, as provided, that request must be made before an action for damages is available. The existing definition of protected disclosure would be revised to specifically include any communication based on, or when carrying out, job duties, that otherwise falls within the definition above. *The bill would modify the definition of improper governmental activity to include any activity by an employee that is undertaken inside a state office, or, if undertaken outside a state office, directly relates to the functioning of state government. The bill would also expand the definition of protected disclosure to specifically include any good faith communication to the Bureau of State Audits alleging an improper governmental activity and any evidence delivered to the Bureau of State Audits in support of the allegation.*

(3) Existing law requires the State Personnel Board to initiate a hearing or investigation of a written complaint of reprisal or retaliation that is prohibited by the California Whistleblower Protection Act within 10 working days of its submission. The executive officer is required to complete findings of the hearing or investigation within 60 working days thereafter and provide a copy of the findings to the complaining state employee or applicant for state employment and to the appropriate supervisor, manager, employee, or appointing authority. Within 60 days after receiving notification regarding a prohibited act, the appointing power must either serve notice of adverse action, as specified, or set forth in writing its reasons for not doing so. Existing law permits the supervisor, manager, employee, or appointing power to request a hearing before the State Personnel Board regarding the findings of the executive officer if the executive officer finds that the supervisor, manager, employee, or appointing power retaliated against the complainant for engaging in protected whistleblower activities. Existing law provides

that every person who violates these provisions is guilty of a misdemeanor.

This bill would instead require the board to either initiate a hearing or investigation of a written complaint of any improper acts prohibited by the act within 10 working days of its submission, or, upon written request of the complaining person submitted to the board within 10 working days of the submission of a complaint, issue a right-to-sue notice containing specified information to the person within 10 working days of the request, instead of initiating a hearing or investigation. Because a violation of these provisions would be a crime, the bill would impose a state-mandated local program.

(4) Existing law provides that if, after the hearing described in (4) above, the State Personnel Board determines that a violation of the California Whistleblower Protection Act occurred, or if no hearing is requested and the findings of the executive officer conclude that improper activity has occurred, the board may order any appropriate relief.

This bill would specify that appropriate relief may include, but would not be limited to, at the employee's request and with the employee's consent, transfer to or placement in any vacant position for which the employee is qualified.

(5) Existing law requires a public entity that provides for the defense of a state employee charged with a violation of the California Whistleblower Protection Act to reserve all rights to be reimbursed for any costs incurred in that defense. If a state employee is found to have violated the act, he or she is liable for all defense costs and is required to reimburse the public entity for those costs.

This bill would provide that if a state employee is successful in an action brought before the board pursuant to those provisions, the complaining employee shall be reimbursed for all costs incurred, including reasonable attorney's fees.

This bill would also require the administrative law judge to make any orders that may appear just in order to prevent any named party from being embarrassed, delayed, or put to unnecessary expense, and may make other orders as the interests of justice may require during the administrative hearing, in all cases.

The bill would also make technical, conforming changes to those provisions.

(6) The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.

This bill would provide that no reimbursement is required by this act for a specified reason.

Vote: majority. Appropriation: no. Fiscal committee: yes.

State-mandated local program: yes.

The people of the State of California do enact as follows:

1 SECTION 1. The Legislature finds and declares the following:

2 (a) It is the public policy of this state to protect and safeguard
3 the right and freedom of all former, current, and prospective public
4 employees, as well as members of the public interacting with state
5 government, the California State University, and the University
6 of California to report waste, fraud, abuse of authority, violation
7 of law, or threat to public health and safety without restraint or
8 fear of retribution or actual retribution due to having engaged in
9 a protected disclosure reporting those government improprieties.

10 (b) Public servants best serve the citizenry when they can be
11 candid and honest without reservation in conducting the people's
12 business.

13 (c) The practice of restraining and retaliating against public
14 servants by denying employment or contractual opportunity,
15 decreasing the job responsibilities of an employee's normal
16 workload, creating hostile work environments, and discriminating
17 in the terms or conditions of employment or contract for these
18 reasons foments unrest and dissatisfaction, deprives the state of
19 the fullest use of its capacities for development and advancement,
20 and substantially and adversely affects the interest of public
21 employees, employers, and the public in general.

22 (d) The practice of restraining and retaliating against others
23 because of their protected disclosure of improper governmental
24 activities is declared to be against public policy.

25 (e) The purpose of this act is to provide effective, efficient
26 remedies that will eliminate these retaliatory practices.

27 (f) This act shall be deemed an exercise of the police power of
28 the state for the protection of the welfare, health, and peace of the
29 people of this state.

1 SEC. 2. Section 8547.2 of the Government Code is amended
2 to read:

3 8547.2. For the purposes of this ~~article~~ *article, the following*
4 *terms have the following meanings:*

5 (a) “Employee” means any individual appointed by the Governor
6 or employed or holding office in a state agency as defined by
7 Section 11000, including, for purposes of Sections 8547.3 to
8 8547.7, inclusive, any employee of the California State University
9 *or an individual appointed by the Legislature to a state board or*
10 *commission and who is not a Member or employee of the*
11 *Legislature.* “Employee” includes any former employee who met
12 the criteria of this subdivision during his or her employment.

13 (b) “Improper governmental activity” means any activity by a
14 state agency or by an employee that is undertaken in the
15 performance of the employee’s official duties, *undertaken inside*
16 *a state office, or, if undertaken outside a state office by the*
17 *employee, directly relates to state government,* whether or not that
18 action is within the scope of his or her employment, and that (1)
19 is in violation of any state or federal law or regulation, including,
20 but not limited to, corruption, malfeasance, bribery, theft of
21 government property, fraudulent claims, fraud, coercion,
22 conversion, malicious prosecution, misuse of government property,
23 or willful omission to perform duty, or (2) is economically
24 wasteful, or involves gross misconduct, incompetency, or
25 inefficiency. For purposes of Sections 8547.4, 8547.5, 8547.10,
26 and 8547.11, “improper governmental activity” includes any
27 activity by the University of California or by an employee,
28 including an officer or faculty member, who otherwise meets the
29 criteria of this subdivision.

30 (c) “Person” means any individual, corporation, trust,
31 association, any state or local government, or any agency or
32 instrumentality of any of the foregoing.

33 (d) “Protected disclosure” means any good faith communication,
34 including any communication based on, or when carrying out, job
35 duties, that discloses or demonstrates an intention to disclose
36 information that may evidence (1) an improper governmental
37 activity or (2) any condition that may significantly threaten the
38 health or safety of employees or the public if the disclosure or
39 intention to disclose was *made* for the purpose of remedying that
40 condition. *Protected disclosure specifically includes any good*

1 *faith communication to the Bureau of State Audits alleging an*
2 *improper governmental activity and any evidence delivered to the*
3 *Bureau of State Audits in support of the allegation.*

4 (e) “Illegal order” means any directive to violate or assist in
5 violating a federal, state, or local law, rule, or regulation or any
6 order to work or cause others to work in conditions outside of their
7 line of duty that would unreasonably threaten the health or safety
8 of employees or the public.

9 (f) “State agency” is defined by Section 11000. “State agency”
10 includes the University of California for purposes of Sections
11 8547.5 to 8547.7, inclusive, and the California State University
12 for purposes of Sections 8547.3 to 8547.7, inclusive.

13 SEC. 3. Section 8547.8 of the Government Code is amended
14 to read:

15 8547.8. (a) A state employee or applicant for state employment
16 who files a written complaint with his or her supervisor, manager,
17 or the appointing power alleging actual or attempted acts of
18 reprisal, retaliation, threats, coercion, or similar improper acts
19 prohibited by Section 8547.3, may also file a copy of the written
20 complaint with the State Personnel Board, in accordance with the
21 provisions of Section 19683, together with a sworn statement that
22 the contents of the written complaint are true, or are believed by
23 the affiant to be true, under penalty of perjury. If a complaint is
24 filed with the board, it shall be filed within 12 months of the most
25 recent act of reprisal covered by the complaint.

26 (b) Any person who intentionally engages in acts of reprisal,
27 retaliation, threats, coercion, or similar acts against a state
28 employee or applicant for state employment for having made a
29 protected disclosure is subject to a fine not to exceed ten thousand
30 dollars (\$10,000) and imprisonment in the county jail for a period
31 not to exceed one year. Pursuant to Section 19683, any state civil
32 service employee who intentionally engages in that conduct shall
33 be disciplined by adverse action as provided by Section 19572.

34 (c) In addition to all other penalties provided by law, any person
35 who intentionally engages in acts of reprisal, retaliation, threats,
36 coercion, or similar acts against a state employee or applicant for
37 state employment for having made a protected disclosure shall be
38 liable in an action for damages brought against him or her by the
39 injured party. Punitive damages may be awarded by the court if
40 the acts of the offending party are proven to be malicious. Where

1 liability has been established, the injured party shall also be entitled
2 to reasonable attorney's fees as provided by law. However, any
3 action for damages shall not be available to the injured party unless
4 the injured party has first filed a complaint with the State Personnel
5 Board pursuant to subdivision (a), and either (1) the board has
6 issued, or failed to issue, findings pursuant to Section 19683; or
7 (2) the injured party requested a right-to-sue notice from the board
8 pursuant to Section 19683.

9 (d) This section is not intended to prevent an appointing power,
10 manager, or supervisor from taking, directing others to take,
11 recommending, or approving any personnel action or from taking
12 or failing to take a personnel action with respect to any state
13 employee or applicant for state employment if the appointing
14 power, manager, or supervisor reasonably believes any action or
15 inaction is justified on the basis of evidence separate and apart
16 from the fact that the person has made a protected disclosure as
17 defined in subdivision (d) of Section 8547.2.

18 (e) In any civil action or administrative proceeding, once it has
19 been demonstrated by a preponderance of evidence that an activity
20 protected by this article was a contributing factor in the alleged
21 retaliation against a former, current, or prospective employee, the
22 burden of proof shall be on the supervisor, manager, or appointing
23 power to demonstrate by clear and convincing evidence that the
24 alleged action would have occurred for legitimate, independent
25 reasons even if the employee had not engaged in protected
26 disclosures or refused an illegal order. If the supervisor, manager,
27 or appointing power fails to meet this burden of proof in an adverse
28 action against the employee in any administrative review,
29 challenge, or adjudication in which retaliation has been
30 demonstrated to be a contributing factor, the employee shall have
31 a complete affirmative defense in the adverse action.

32 (f) Nothing in this article shall be deemed to diminish the rights,
33 privileges, or remedies of any employee under any other federal
34 or state law or under any employment contract or collective
35 bargaining agreement.

36 SEC. 4. Section 19683 of the Government Code is amended
37 to read:

38 19683. (a) The State Personnel Board shall either:

39 (1) Initiate a hearing or investigation of a written complaint of
40 any improper acts prohibited by Section 8547.3 within 10 working

1 days of its submission. The executive officer shall complete
2 findings of the hearing or investigation within 60 working days
3 thereafter, and shall provide a copy of the findings to the
4 complaining state employee or applicant for state employment and
5 to the appropriate supervisor, manager, employee, or appointing
6 authority. When the allegations contained in a complaint of reprisal
7 or retaliation are the same as, or similar to, those contained in
8 another appeal, the executive officer may consolidate the appeals
9 into the most appropriate format. In these cases, the time limits
10 described in this subdivision shall not apply.

11 (2) Upon the written request of the complaining person,
12 submitted to the board within 10 working days of the submission
13 of a complaint pursuant to Section 8547.8, issue a right-to-sue
14 notice to the complaining person within 10 working days of the
15 request. The right-to-sue notice shall notify the complaining person
16 of his or her right to file a civil action against any person who is
17 subject to the provisions of Section 8547.3 within two years after
18 receipt of the right-to-sue notice. The superior courts of the State
19 of California shall have jurisdiction of those actions, and the
20 complaining person may file in these courts. An action may be
21 brought in any county in the state in which the unlawful practice
22 is alleged to have been committed, in the county in which the
23 records relevant to the practice are maintained and administered,
24 or in the county in which the complaining person would have
25 worked but for the alleged unlawful practice. If the defendant is
26 not found within any of these counties, an action may be brought
27 within the county of the defendant's residence or principal office.

28 (b) If the executive officer finds that the supervisor, manager,
29 employee, or appointing power retaliated against the complainant
30 for engaging in protected whistleblower activities, the supervisor,
31 manager, employee, or appointing power may request a hearing
32 before the State Personnel Board regarding the findings of the
33 executive officer. The request for hearing and any subsequent
34 determination by the board shall be made in accordance with the
35 board's normal rules governing appeals, hearings, investigations,
36 and disciplinary proceedings.

37 (c) If, after the hearing described in subdivision (a), the State
38 Personnel Board determines that a violation of Section 8547.3
39 occurred, or, if no hearing is requested and the findings of the
40 executive officer conclude that improper activity has occurred, the

1 board may order any appropriate relief, including, but not limited
2 to, at the employee's request and with the employee's consent,
3 transfer to or placement in any vacant position for which the
4 employee is qualified, reinstatement, backpay, restoration of lost
5 service credit, if appropriate, compensatory damages, and the
6 expungement of any adverse records of the state employee or
7 applicant for state employment who was the subject of the alleged
8 acts of misconduct prohibited by Section 8547.3.

9 (d) Whenever the board determines that a manager, supervisor,
10 or employee, who is named a party to the retaliation complaint,
11 has violated Section 8547.3 and that violation constitutes legal
12 cause for discipline under one or more subdivisions of Section
13 19572, it shall impose a just and proper penalty and cause an entry
14 to that effect to be made in the manager's, supervisor's, or
15 employee's official personnel records.

16 (e) Whenever the board determines that a manager, supervisor,
17 or employee, who is not named a party to the retaliation complaint,
18 may have engaged in or participated in any act prohibited by
19 Section 8547.3, the board shall notify the manager's, supervisor's,
20 or employee's appointing power of that fact in writing. Within 60
21 days after receiving the notification, the appointing power shall
22 either serve a notice of adverse action on the manager, supervisor,
23 or employee, or set forth in writing its reasons for not taking
24 adverse action against the manager, supervisor, or employee. The
25 appointing power shall file a copy of the notice of adverse action
26 with the board in accordance with Section 19574. If the appointing
27 power declines to take adverse action against the manager,
28 supervisor, or employee, it shall submit its written reasons for not
29 doing so to the board, which may take adverse action against the
30 manager, supervisor, or employee as provided in Section 19583.5.
31 A manager, supervisor, or employee who is served with a notice
32 of adverse action pursuant to this section may file an appeal with
33 the board in accordance with Section 19575.

34 (f) In order for the Governor and the Legislature to determine
35 the need to continue or modify state personnel procedures as they
36 relate to the investigations of reprisals or retaliation for the
37 disclosure of information by public employees, the State Personnel
38 Board, by June 30 of each year, shall submit a report to the
39 Governor and the Legislature regarding complaints filed, hearings
40 held, and legal actions taken pursuant to this section.

1 (g) In all cases, including those in which individually named
2 respondents have joined in a consolidated hearing, the
3 administrative law judge shall make any orders that may appear
4 just in order to prevent any named party from being embarrassed,
5 delayed, or put to unnecessary expense, and may make other orders
6 as the interests of justice may require during the administrative
7 hearing.

8 SEC. 5. Section 19683.5 of the Government Code is amended
9 to read:

10 19683.5. If a state employee is successful in an action brought
11 pursuant to Section 19683, the complaining employee shall be
12 reimbursed for all costs and reasonable attorney's fees incurred
13 pursuant to Section 995.3.

14 SEC. 6. No reimbursement is required by this act pursuant to
15 Section 6 of Article XIII B of the California Constitution because
16 the only costs that may be incurred by a local agency or school
17 district will be incurred because this act creates a new crime or
18 infraction, eliminates a crime or infraction, or changes the penalty
19 for a crime or infraction, within the meaning of Section 17556 of
20 the Government Code, or changes the definition of a crime within
21 the meaning of Section 6 of Article XIII B of the California
22 Constitution.